

PROTECTED ACTIVITY

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Protected Activity:

- Objectives...to provide an overview of:
 - › Statutory Rights
 - › Definition of Protected Activity and other key concepts (Flagrant Misconduct, Otherwise Exceeds the Bounds)
 - › Union Rights
 - › Management's Right to Discipline *vis a vis* Union Rights re: protected activity
 - › Significant Cases

PROTECTED ACTIVITY: Statutory Rights

- Under Section 7102 of the Statute, employees can form, join or assist any labor organization, or refrain from such activity, without fear of reprisal.

PROTECTED ACTIVITY: Statutory Rights

- ◎ Under Section 7116 of the Statute, it is an Unfair Labor Practice to:
 - › Interfere with employee's right to join and/or participate in a labor organization
 - › Encourage/discourage membership in a labor organization by discrimination in connection with hiring, tenure, promotion or other conditions of employment
 - › To discipline or otherwise discriminate against an employee who has filed any complaint, affidavit, or petition or has given any information or testimony under the Statute.

PROTECTED ACTIVITY: Statutory Rights

- A management action is found to be a ULP when:
 - 1) Discriminatory action was taken against an employee who was engaged in *protected activity*; and,
 - 2) Such activity was a motivating factor in the agency's treatment of the employee.

* 35 FLRA No. 15, 60 FLRA 230, 58 FLRA 636

* 61 FLRA No. 170; 61 FLRA No. 163

Protected Activity

- Extends beyond management “actions” of discrimination, etc.
- Allows union representatives to behave differently than non-union representatives in terms of speech and actions

PROTECTED ACTIVITY

- Rude, profane, insulting and/or degrading statements made by an employee to a supervisor are likely to result in sustainable discipline UNLESS the statements are made by a union representative in the context of a labor-management relationship
- Such statements are often considered to be “PROTECTED” speech.

UNION RIGHTS

- Speech that would normally be subject to discipline is OK if made while engaged in protected activity/robust debate.
- Union officials acting in their official capacity “have very broad latitude in speech and action.”
 - 57 FLRA 343

UNION RIGHTS: ROBUST DEBATE

- Unions have the right to use “intemperate, abusive or insulting language without fear of restraint or penalty” if it believes such language is an effective way to make the union’s point.
 - (1974 SUPREME COURT RULING ON “ROBUST DEBATE”)

UNION RIGHTS: ROBUST DEBATE

● Example –

- Supervisor and Union President engaged in discussion re: staffing
- Union president, frustrated with Supervisor, said “F**k you, I don’t give a f**k”
- Supervisor removed employee from worksite, in view of other employees

*64 FLRA 410

UNION RIGHTS: ROBUST DEBATE

- ◉ Words may be:
 - › Vulgar
 - › Vicious
 - › Personal attacks of a highly sexual nature
- 51 FLRA 7

RIGHT TO DISCIPLINE

- Unlawful to impose discipline for conduct occurring when an employee is engaged in protected activity UNLESS
 - Conduct constitutes “flagrant misconduct”
 - Conduct otherwise “exceeds the bounds of protected activity.”
 - 60 FLRA 230

MANAGEMENT RIGHT TO DISCIPLINE: FLAGRANT MISCONDUCT

- Language of such “an outrageous and insubordinate nature” as to remove them from protection of the Statute,

- 45 FLRA No. 14

FLAGRANT MISCONDUCT

- Burden on agency to establish flagrant misconduct
- FLRA uses balancing test
- FLRA looks at relevant factors
 - 59 FLRA 767

FLRA ANALYSIS

- ◎ Same analysis as in union discrimination cases
- ◎ General Counsel bears the initial burden of proof by preponderance of evidence that:
 - › the employee was engaged in protected activity
 - › such activity was a motivating factor in agency action against employee
- ◎ Agency must then prove:
 - › it had legitimate reasons for the action
 - › It would have taken same action even if employee was not engaged in protected activity (35 FLRA 113)

BALANCING TEST: FLAGRANT MISCONDUCT

- The FLRA must balance the employee's right to engage in protected activity, which "permits leeway for impulsive behavior, . . . against the employer's right to maintain order and respect for its supervisory staff. . . ." 63 FLRA 553, 51FLRA 7

RELEVANT FACTORS: FLAGRANT MISCONDUCT

- ◉ Relevant Factors (not all required)
 - › Place and subject matter of discussion
 - › Whether outburst was impulsive or designed
 - › Whether outburst was provoked
 - › The nature of the intemperate language and conduct.

"OTHERWISE EXCEEDS THE BOUNDS"

- "Flagrant Misconduct" is "illustrative of," but is not the only type of action that could justify removal of conduct from the protection of Section 7102 of the Statute. Davis Monthan AFB, 58 FLRA at 636, citing Dep't of the Air Force, 315th Airlift Wing v. FLRA, 294 F.3d 192, 202 (D.C. Cir. 2002).
- Another category of unprotected activity – union representative conduct that "otherwise exceeds the bounds of protected activity." *AFGE and SSA, Valrico, FL*, 59 FLRA 767 (2004)

“Otherwise Exceeds the Bounds”

◎ FLRA

- › Case-by-case basis
- › Totality of circumstances
- › May consider professional nature of the workplace
 - 59 FLRA 767

Other Misconduct

- Opprobrious conduct while engaged in protected activity may justify a disciplinary action, including removal.
- Other employee conduct that is “too far out of line.”
- Employee pattern of conduct over a period of time, although no one incident may constitute flagrant misconduct
 - 61 FLRA 16

RIGHT TO TAKE ACTION

- ◉ Management may treat union representatives same as it would treat any other similarly situated, non-union employee:
 - › Performance Issues
 - › Discipline
 - › Ethics Violations
 - › Internal Security

Is it Protected?

- Calling a supervisor an “Uncle Tom” and making threatening remarks.
 - 63 FLRA 362
- Union witness made false statements to the FLRA regarding a ULP.
 - 61 FLRA 127
- Union officer made intimidating gestures and said she’d “get” her supervisor”.
 - 59 FLRA No 73

Is it Protected?

- Union rep behaved rudely during a grievance meeting – refused to sit, pointed finger in supervisor's face and left without permission
 - 60 FLRA 230
- The grievant, a union officer, interrupted an office birthday party to declare the event "a blatant and ridiculous display of management power."
 - 64 FLRA No. 107

Is it Protected?

- The grievant was called to a meeting with a supervisor and another employee. The grievant became angry, made threats of litigation and used mild profanity
 - 59 FLRA No. 36
- Posting literature on union bulletin board creating “racially hostile work environment.”
 - 53 FLRA No. 59

Is it Protected?

- Union Steward received a warning regarding discourteous remarks made while performing job duties.
 - 52 FLRA No. 87

TIPPING THE SCALE...

- ◉ Go back to the 4 criteria:
 - › What is the setting and subject matter?
 - › Was there intent to be subordinate, or did union representative get caught in the moment?
 - › Was there provocation by management?
 - › What was the nature of the intemperate language?

STRATEGIES

- Provide clear warnings
- Recognize protected right and differentiate unprotected conduct
- Seek corrective action
- Progressive discipline
- Do not back off

STRATEGIES

- ◎ Also remember:
 - Collective bargaining can be emotionally charged...deal with it!
 - Both “flagrant misconduct” and “otherwise exceeds the bounds of protected activity” are hard to prove

Questions??

Thank you!!